Supreme Court, U.S.
FILED
DEC 16 2002
CLERK

No. 02-409

In the Supreme Court of the United States

ALLAN J. FAVISH, PETITIONER

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
LEONARD SCHAITMAN
ROBERT M. LOEB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The question presented is:

Whether Exemption 7(C) protects the privacy interests of surviving family members in photographs taken of a close family member at the scene of his death.

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 56a- 57a) is not published in the *Federal Reporter*, but it is *reprinted in* 37 Fed. Appx. 863. A prior opinion by the court of appeals in this case (Pet. App. 16a-52a) is reported at 217 F.3d 1168. The orders of the district court (Pet. App. 1a-15a, 53a-55a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 6, 2002. Petitions for rehearing were denied on August 16, 2002. (Pet. App. 58a). The petition for a writ of certiorari was filed on September 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, exempts a variety of categories of information from the government's general duty of disclosure.

One such category, described in FOIA Exemption 7(C), consists of "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

2. This FOIA suit arises from the July 1993 suicide of Deputy White House Counsel Vincent Foster. Foster was found dead in Fort Marcy Park in McLean, Virginia. The United States Park Police conducted the initial investigation of Foster's death and took color photographs of the death scene, including ten pictures of Foster's body. Investigations by the Park Police, the FBI, and congressional committees in both the House of Representatives and the Senate concluded that Foster committed suicide. Pet. App. 17a.

The Office of Independent Counsel twice investigated Foster's death, first through Independent Counsel Robert Fiske, Jr., and later through Independent Counsel Kenneth Starr. Pet. App. 17a, 36a, 38a. Mr. Fiske issued a 58-page report concluding that the "overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide." *Id.* at 36a (citation omitted). Three years later, Mr. Starr filed a 114-page report that concurred with the conclusion of every other investigation, explaining that "[t]he available evidence points clearly to suicide as the manner of death." *Id.* at 38a (citation omitted).

3. A public-interest group, Accuracy in Media, filed a FOIA request with the Park Police seeking the autopsy photographs and death-scene photographs of Foster's body. The government declined to provide the photographs. The Court of Appeals for the District of Columbia Circuit sustained that decision, holding that the photographs are exempt from mandatory disclosure

under FOIA Exemption 7(C). *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).

4. Petitioner, who was an attorney for Accuracy in Media in the D.C. Circuit case, filed his own FOIA request for the ten death-scene photographs, seeking them from the Office of Independent Counsel.[1] The Office withheld them under Exemption 7(C). Petitioner filed suit in the Central District of California. The district court initially sustained the government's invocation of Exemption 7(C). Pet. App. 1a-13a.

A divided Court of Appeals for the Ninth Circuit reversed and remanded the case. Pet. App. 16a-52a. The court agreed with every other circuit court to address the question that "the personal privacy in the statutory exemption [Exemption 7(C)] extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Id.* at 24a. The court then remanded the case for the district court to review the photographs *in camera* and balance "the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." *Id.* at 25a.

Judge Pregerson agreed with the majority that Exemption 7(C) protects the privacy interests of surviving family members, Pet. App. 25a-26a, but filed a lengthy dissent disagreeing with the majority's remand of the case and its analysis of the public interest in disclosure, *id.* at 26a-52a. He reasoned that the

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[1] Petitioner sought color copies of the photographs, while the D.C. Circuit case involved a request for black-and-white copies of the photographs.

government's *Vaughn* index[2] was sufficiently comprehensive to make a remand for *in camera* review of the photographs unnecessary, *id.* at 30a, and that the "pain and anguish" that petitioner concedes the Foster family would suffer, *id.* at 44a, outweighs the public interest in obtaining those particular photographs to facilitate a sixth investigation into the cause of Foster's death, *id.* at 46a-51a.

5. On remand, the district court construed the court of appeals' opinion as permitting the withholding under Exemption 7(C) of only those photographs that are "graphic, explicit and extremely upsetting." Pet. App. 53a (citation omitted). The district court accordingly ordered release of five of the ten photographs.[3]

6. The government appealed, and members of the Foster family intervened on appeal. In a one-sentence, unpublished disposition, the court of appeals affirmed the district court's judgment insofar as it sustained the withholding of five of the photographs and required the release of four others. The court held, however, that one photograph ordered released by the district court had been properly withheld by the Office of Independent Counsel. Pet. App. 56a-57a. Judge Pregerson dissented on the ground that the nine "never-before-released" photographs were properly withheld under Exemption 7(C). 37 Fed. Appx. 863 (9th Cir. 2002) (quoting *Favish* v. *Office of Indep. Counsel*, 217 F.3d

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[2] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[3] Those five included one photograph of a gun in Foster's hand that had been published by *Time* magazine. Pet. App. 17a.

1168, 1187 (9th Cir. 2000)).[4] The court of appeals denied the government's and the Foster family's petitions for rehearing and for rehearing en banc. Judge Pregerson would have granted panel rehearing. Pet. App. 58a.

ARGUMENT

Petitioner argues (Pet. 4-11) that this Court should grant review of the question whether Exemption 7(C) protects the privacy interests of surviving family members. Petitioner, however, identifies no conflict in the circuits on that question. To the contrary, the court of appeals' recognition of that privacy interest in this case is consistent with the decision of every court to address the question. See *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120, 122-123 (D.C. Cir. 1999) (death-scene photographs of Vincent Foster protected from disclosure), cert. denied, 529 U.S. 1111 (2000); *Hale* v. *United States Dep't of Justice*, 973 F.2d 894, 902 (10th Cir. 1992) (personal privacy interest in photographs of deceased family member), vacated and remanded on other grounds, 509 U.S. 918, on remand, 2 F.3d 1055, 1057 (10th Cir. 1993) (reaffirming privacy interest under Exemption 7(C)); *Marzen* v. *Department of Health and Human Servs.*, 825 F.2d 1148, 1154 (7th Cir. 1987) (medical records of deceased infant exempt from disclosure based on the parents' right to privacy); *Bowen* v. *United States Food & Drug Admin.*, 925 F.2d 1225, 1228-1229 (9th Cir. 1991) (autopsy reports exempt based on invasion of family member's personal privacy); *Badhwar* v. *United States Dep't of the Air Force*, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports protected based upon privacy interests of surviving family

[4] Judge Pregerson's dissent is omitted from petitioner's appendix. Judge Pregerson agreed with the ordered release of the one photograph published by *Time* magazine. See note 3, *supra*.

members); see *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9-10 (Feb. 1975).[5]

Indeed, in the *Accuracy in Media* case, this Court denied a petition for a writ of certiorari presenting the virtually identical question for review in a case involving the same photographs of Vincent Foster that are at issue here. 529 U.S. 1111 (2000). Nothing warrants according this petition any different treatment.

Petitioner's argument (Pet. 6-9) that the court of appeals' decision conflicts with this Court's decision in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), is without merit. In *Reporters Committee*, the Court recognized a protected "interest in avoiding disclosure of personal matters" under Exemption 7(C). *Id.* at 762. Contrary to petitioner's argument (Pet. 6-7), however, the Court did not confine the privacy interest protected by Exemption 7(C) to the two narrow areas of personal information and intimate decisionmaking. To the contrary, the Court held that there were "*at least* two different kinds of [privacy] interests" cognizable under FOIA that were relevant to the facts in that case. 489 U.S. at 762 (emphasis added) (citation and footnotes

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[5] See also *New York Times Co.* v. *NASA*, 920 F.2d 1002, 1004 (D.C. Cir. 1990) (en banc) (NASA "is entitled to an opportunity to prove its claim that release of the [last words of the Challenger astronauts recorded on an audio] tape would invade the privacy of the deceased astronauts, or of their families"); *Katz* v. *National Archives & Records Admin.*, 862 F. Supp. 476, 485 (D.D.C. 1994) (holding that President Kennedy's autopsy material was exempt from disclosure because, among other things, it would cause "additional anguish" to the surviving family and would constitute a clearly unwarranted invasion of the family's privacy), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995).

omitted). The Court then held that FOIA's privacy protection encompasses information about a private citizen in government files, including FBI rap sheets, even though the data within the document—information regarding a third party's arrests, convictions, and sentences—were matters of public record. *Id.* at 762-771.

In so holding, the Court stated "as a categorical matter" that, when "a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'" *Reporters Comm.*, 489 U.S. at 780; see also *Department of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994) (FOIA privacy protection extends to home addresses of third parties in government files, even though they may be publicly available).

That rationale fully supports the court of appeals' ruling here. The materials that petitioner seeks are not records or "official information" about agency action, but photographs of a private individual's dead body "that the Government happens to be storing." *Reporters Comm.*, 489 U.S. at 780. The pictures reveal nothing about the government's conduct themselves, but only the tragic consequences of an individual's suicide. That petitioner claims the photographs could be used derivatively to expose errors in *other* governmental records is no answer to *Reporters Committee*'s recognition of a privacy interest in information about private third parties that happens to be held by the government.

Lastly, petitioner argues (Pet. 11-12) that the court of appeals erred by "failing to consider partial redaction" of the six withheld photographs. That fact-specific and record-bound determination does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
LEONARD SCHAITMAN
ROBERT M. LOEB
Attorneys

DECEMBER 2002